IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1980

NO. 80-5488

JOHN EDWARD SWINDLER — Petitioner

v.

STATE OF ARKANSAS — Respondent

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF ARKANSAS

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION

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Respondent, State of Arkansas, responds to petitioner's petition for writ of certiorari to the Supreme Court of Arkansas.

QUESTIONS PRESENTED FOR REVIEW

I. Whether petitioner was sentenced to death by a jury chosen in violation of the constitutional standards provided in Witherspoon v. Illinois, 391 U.S. 510 (1968)?

II. Whether petitioner was sentenced to death in violation of his Eighth and Fourteenth Amendment guarantees to due process because he was denied the opportunity to present mitigation evidence when the trial court denied his request for a continuance?

III. Whether petitioner was denied his right to trial by a fair and impartial jury as guaranteed by the Sixth and Fourteenth Amendments in that three jurors seated acknowledged that they had at one time formed opinions regarding petitioner's guilt?

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The opinion of the Arkansas Supreme Court affirming petitioner's conviction is reported at Swindler v. State, 267 Ark. Adv. Sh. 418, 592 S.W.2d 91 (1979). That opinion is reproduced in slip form in the petitioner's appendix at A-1.

JURISDICTION

The petitioner has adequately set forth the jurisdictional grounds. As this case involves the imposition of the death penalty, respondent waives its right to oppose the petition on the grounds that it is untimely filed.

CONSTITUTIONAL AND STATUTORY PROVISIONS

The relevant constitutional provisions were stated by petitioner.

> Ark. Stat. Ann. §43-1706 (Repl. 1977). Civil procedure applicable. -- The provisions of the Code of Practice in civil actions, in regard to postponements of the trial of actions, shall apply to the postponement of prosecutions on behalf of defendants.
>
> Ark. Stat. Ann. §27-1403 (Repl. 1979). Continuance for absence of evidence or witness -- Requisites of motion -- Admission as to testimony of absent witness to prevent continuance. -- A motion to postpone a trial on account of the absence of evidence shall, if required by the opposite party, be made only upon affidavit showing the materiality of the evidence expected to be obtained, and that due diligence has been used to obtain it; and if it be for an absent witness, the affidavit must show what facts the affiant believes the witness will prove, and not merely the effect of such facts in evidence, that the affiant himself believes them to be true, and that the witness is not absent by the consent, connivance, or procurement of the party asking the postponement. If thereupon the adverse party will admit that on trial the absent witness, if present, would testify to the statement contained in the application for a continuance, then the trial shall not be postponed for that cause. Provided, the opposite party may controvert the statement so set forth in the said motion for continuance by evidence.
>
> Ark. Stat. Ann. §41-1304 (Repl. 1977). Mitigating circumstances. -- Mitigating circumstances shall include, but are not limited to the following:

(1) the capital murder was committed while the defendant was under extreme mental or emotional disturbance;

(2) the capital murder was committed while the defendant was acting under unusual pressures or influences or under the domination of another person;

(3) the capital murder was committed while the capacity of the defendant to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of the law was impaired as a result of mental disease or defect, intoxication, or drug abuse;

(4) the youth of the offender at the time of the commission of the capital murder;

(5) the capital murder was committed by another person and the defendant was an accomplice and his participation relatively minor;

(6) the defendant has no significant history of prior criminal activity.

STATEMENT OF THE CASE

Although petitioner's statement of the case is remarkably self-serving, it adequately apprises the Court of the context in which the issues arose.

SUMMARY OF RESPONDENT'S ARGUMENT

I.

While Murl Carmack gave the equivocal replies quoted by petitioner when questioned about his feelings and beliefs regarding the imposition of the death penalty, he clearly replied unequivocally that he would not, under any set of facts or circumstances, consider or impose the death penalty, no matter what the law might be. He was thus properly excused under the standard of Witherspoon v. Illinois, 391 U.S. 510 (1968).

II.

Both this Court and several state supreme courts have addressed the issue of what evidence is material and relevant when offered in mitigation by a defendant in a capital case. The evidence proffered by petitioner was neither material nor relevant under the holdings of these cases, as the testimony of the proffered witness related neither to the petitioner himself nor to the crime with which he was charged. The witness would merely have testified that electrocution is cruel and unusual punishment and that some convicted murderers who did not receive the death penalty were later rehabilitated.

The trial court did not err in refusing to grant a continuance in order that petitioner might present this witness at the sentencing hearing, as the testimony he proffered regarding electrocution related to an issue already decided as a matter of law, and the evidence regarding rehabilitation was neither relevant nor material. Petitioner thus had no constitutional right to present the testimony at issue.

III.

The three jurors challenged for cause because they had formed some opinion as to petitioner's guilt were properly seated after each stated that he would set aside any prior opinion formed, listen to the evidence presented, and decide the case based only on what he saw and heard in the courtroom. There was no showing of prejudicial pretrial publicity necessitating strict scrutiny of the jurors' responses on this issue.

REASONS FOR DENYING THE WRIT

I. JUROR MURL CARMACK WAS PROPERLY EXCUSED FOR CAUSE BECAUSE HE STATED UNEQUIVOCALLY THAT HE WOULD NEVER CONSIDER OR IMPOSE THE DEATH PENALTY.

Petitioner's argument on this point is misleading, and his statement of Juror Murl Carmack's position is blatantly self-serving.

It is true, as petitioner states, that Carmack gave several imprecise answers on voir dire as to his willingness or ability to impose the death penalty.

Petitioner has also correctly stated the law with regard to the restrictions placed on the trial court in excusing prospective jurors for cause under Witherspoon v. Illinois, 391 U.S. 510 (1968), and its progeny, so respondent will not reiterate that standard here.

Petitioner apparently bases his argument on Mr. Carmack's statements that he "wouldn't think" the death penalty is proper punishment for some crimes; that he "wouldn't want to" vote for the death penalty; and that he didn't "think (he) would" vote for the death penalty, no matter what the facts or the law. Even though the responses were somewhat weak, it should be noted that Mr. Carmack never indicated in any way whatsoever that he might consider or impose the death penalty.

Petitioner has conveniently omitted, however, the unequivocal answers Carmack gave when the prosecutor refused to accept these earlier replies, which could be termed no more than statements of Carmack's beliefs and feelings. Standing alone, these responses would make Mr. Carmack's exclusion for cause highly suspect under Witherspoon.

The dispositive portion of the voir dire examination is as follows:

MR. KARR: (prosecuting attorney) : So are you telling me that no matter what the facts are, or what the law is, that you would not vote for the death penalty?

MR. CARMACK: No, I don't think I would.

MR. KARR: Okay, now you say you didn't think you would. Can you tell me for sure that you would or would not?

MR. CARMACK: Well, I wouldn't then, I will put it that way.

MR. KARR: No matter what the facts were, or what the law was, you would not vote for the death penalty?

MR. CARMACK: No, I don't believe I could, and then have a clear conscience.

THE COURT: Now, what he has asked you is, and I want to ask you, too, to be sure that I understand. Is that feeling that you have or your belief so fixed and strong that regardless of what the facts might be, regardless of how bad they might be, or how aggravating they might be, in any case, that under no circumstances could you consider imposing the death penalty?

MR. CARMACK: I wouldn't. (T. 1446-1448) [Emphasis added.]

It is hard to imagine how much more forcefully or clearly Mr. Carmack could have answered. When required to state what he would do, rather than how he felt or believed, he stated unequivocally that he would never, under any conceivable fact situation, no matter what the law is, consider or vote for the death penalty.

It is clear from the opinion of the Arkansas Supreme Court that it relied on the same responses emphasized here by respondent in holding that Mr. Carmach was properly excused for cause. Swindler, 267 Ark. Adv. Sh. at 429-30, 592 S.W.2d at 97.

It would seem that Mr. Carmack is exactly the kind of juror that this Court found excusable for cause in Witherspoon. This Court should therefore deny the petition for writ of certiorari on this issue because Mr. Carmack was properly excused for cause under the standard clearly set by this Court in Witherspoon, and no error was committed in the trial court's doing so.

II. PETITIONER WAS NOT CONSTITUTIONALLY ENTITLED TO A CONTINUANCE TO PRESENT THE EVIDENCE HE PROFERRED IN MITIGATION, AS THAT EVIDENCE WAS IRRELEVANT AND IMMATERIAL.

Petitioner alleges that he suffered a constitutional deprivation because the trial court denied his motion for continuance to secure the presence of a witness who would allegedly testify at the sentencing phase of the trial that electrocution is a cruel and inhuman method of inflicting the death penalty and that some persons convicted of capital crimes have been rehabilitated.

The witness was Don Reid, Jr., a publisher and former newspaper reporter who, according to his testimony at a trial in Georgia, had witnessed 189 executions in Texas. (T. 642-644)

When appellant made his motion for witness fees for the witness (T. 241-243), the court held a hearing and received into evidence a transcript of the Georgia proceedings in which Reid testified about the effects of electrocution on a human body. (T. 640-659) The court took both the motion to pay the witness fee and the evidence under advisement. (T. 669)

Reid was scheduled to testify, but when the trial was delayed, petitioner alleged that he could not be present at the time the sentencing stage would begin. Petitioner then moved the court for a continuance so that the witness would be available. (T. 1830-1835) The court took the motion for continuance under advisement, and, before the sentencing stage began, denied the motion because it had "serious reservations as to the competency of the type testimony" (T. 2183); it did not feel "that his is the type testimony that would be admissible as mitigating circumstances under the law of this state" (T. 2184); and it felt "that whether it is cruel and unusual punishment is more a question of law," and Reid's "opinion or reactions. . . would (not) be proper to be shown as a mitigating circumstance." (T. 2185).

Ark. Stat. Ann. §43-1706 (Repl. 1977) provides that the provisions for postponements in civil actions shall apply to postponement of criminal prosecutions requested by a defendant. Ark. Stat. Ann. §27-1403 (Repl. 1979) applies when a continuance is requested because of the absence of evidence or a witness. It requires a showing of both materiality of the evidence and due diligence in obtaining it. It also requires that the movant show by affidavit what facts the witness will prove, that the affiant believes them to be true, and that the witness is not absent by the consent, connivance or procurement of the movant. See Venable v. State, 260 Ark. 201, 538 S.W.2d 286 (1976); Thacker v. State, 253 Ark. 864, 489 S.W.2d 500 (1973).

The issue presented here was raised by petitioner in his direct appeal to the Arkansas Supreme Court, Swindler v. State, 267 Ark. Adv. Sh. 418, 592 S.W.2d 91 (1979). That court held that the granting or denial of a continuance is within the trial court's discretion and will be set aside only if it found an abuse of discretion; it

found no abuse of discretion in this case. The court addressed the substance of Reid's proferred testimony only on the issue of electrocution as a means of execution, holding that petitioner's argument was misplaced:

> [W]hether death by electrocution is cruel and unusual punishment is a question of law and not of fact; nor is it a circumstance to be considered when a jury deliberates on mitigating circumstances. It is not up to the jury to decide how a defendant dies. Death by electrocution has been decided by the General Assembly as the means of execution in such cases. Ark. Stat. Ann. §43-2611 (Repl. 1977).

Swindler, 267 Ark. Adv. Sh. at 433, 592 S.W.2d at 98.

The court dealt further with the substantive issue, noting that it had previously upheld the trial court's finding, after hearing evidence presented by the defendants, that death by electrocution is not cruel and unusual in Ruiz & Van Denton v. State, 265 Ark. 875, 894-95, 901, 582 S.W.2d 915, 928 (1979). Swindler 267 Ark. Adv. Sh. at 431, 592 S.W.2d at 98. See also Collins v. State, 259 Ark. 8, 531 S.W.2d 13 (1975), vacated for reconsideration, 429 U.S. 808 (1976), reconsidered at 261 Ark. 195, 548 S.W.2d 106 (1977), cert. denied, 434 U.S. 878 (1978).

The Arkansas Court's holding with regard to the continuance is consistent with Arkansas case law. See Grigsby v. State, 260 Ark. 499, 542 S.W.2d 275 (1976); Venable v. State, 260 Ark. 201, 538 S.W.2d 286 (1976), both of which involved capital murder convictions.

The Arkansas Court has also squarely held that the State is under no obligation to bring in an expert witness, at its expense, to testify on behalf of a defendant that death by electrocution is cruel and unusual punishment. This is especially true, when, as here, the trial court allowed the expert witness' testimony, given in another case, to be introduced and considered by the court. Ruiz, 265 Ark. at 894, 582 S.W.2d at 928.

The Arkansas Court's holding with regard to the trial court's discretion in granting or denying a continuance is

also consistent with decisions of this Court. See, e.g., Ungar v. Sarafite, 376 U.S. 575, 589 (1964); Avery v. Alabama, 308 U.S. 444, 446 (1940).

The Arkansas Court's holding with regard to the issue of the means of imposition of the death penalty also comports with the decisions of this Court, which discussed in detail the deference given to state legislative policy in imposing the death penalty in Gregg v. Georgia, 428 U.S. 153, 175-86 (1976). In that case, this Court repeatedly noted that legislative policy is interpreted to reflect the community standards, moral values and will of the people. 428 U.S. at 175, 177, 181, 186-87.

This Court upheld the constitutionality of electrocution as a means of inflicting capital punishment almost a century ago in In re Kemmler, 136 U.S. 436, 447-49 (1890). See also Louisiana ex rel. Francis v. Resweber, 329 U.S. 459, 464 (1947). That holding was at least impliedly reiterated as late as 1976 in Gregg, 428 U.S. at 178.

Petitioner alleges that it was also error of constitutional magnitude for the trial court to refuse to allow Reid's testimony with regard to the rehabilitation of some persons convicted of capital crimes. His argument might arguably have some merit were he able to allege that Reid would have testified that petitioner himself could be rehabilitated. That is not the issue, however, and there was no showing that Reid knew anything about petitioner or the circumstances of his crime.

The substance of Reid's proferred testimony can only be deduced from the Georgia transcript introduced at the pretrial hearing. (T. 641-659) Reid testified that he had had occasion, as a newspaper reporter, to observe subsequent proceedings involving defendants convicted of first degree murder and not sentenced to death. His testimony was obviously limited to his experiences in

Texas, and he apparently testified that while some 34 defendants were paroled and were "serving society well," he also noted that some paroled murderers later committed other acts of violence and that at least two committed heinous crimes while on parole.

There is considerable doubt that Reid qualified as an expert witness with regard to the rehabilitation of convicted murderers in view of his limited experience in such cases. Even if he had, however, the trial court was not required to admit such testimony either under the applicable Arkansas statute or under the decisions of this Court.

Ark. Stat. Ann. §41-1304 (Repl. 1977) provides for six specific mitigating factors which can be considered by the jury during the sentencing phase. It also explicitly permits other evidence to be offered in mitigation by not limiting such evidence to the six enumerated factors. The Arkansas Supreme Court has clearly held that mitigating factors not enumerated in the statute are admissible, even under the former statute, which did not contain the language allowing additional evidence. See Hulsey v. State, 261 Ark. 449, 549 S.W.2d 73 (1977), cert. denied, 439 U.S. 882 (1978); Collins v. State, 261 Ark. 195, 210 n. 6, 548 S.W.2d 106, 114 n. 6, cert. denied, 434 U.S. 878 (1977).

While respondent could find no Arkansas cases specifically holding what additional types of evidence may be introduced in mitigation under the language of §41-1304, both this Court and other state courts have addressed this issue.

Although petitioner cites Gardner v. Florida, 430 U.S. 349 (1977), and Lockett v. Ohio, 438 U.S. 586 (1978), in support of his proposition that action which resulted in the exclusion of the proffered evidence here is a violation of his constitutional rights, those cases are of no assistance to him on this issue.

In Gardner the jury found that the mitigating circumstance outweighed the aggravating circumstances and recommended the imposition of a life sentence. The trial judge, after reviewing a confidential presentence report, part of which was never shown either to the prosecutor or to the defendant and was never read into the record, instead imposed the death penalty. The unconstitutional actions involved the imposition of the death penalty because of factors which were never revealed to the defendant and against which he could not defend himself. Although petitioner quotes dictum from Gardner which refers to the possibility of rehabilitation, it obviously referred specifically to consideration of factors regarding the rehabilitation of that particular defendant, and the Court did not hold that even those factors must be considered.

In Lockett, the Court held that a state statute imposing the death penalty may not limit the consideration of relevant mitigating factors. Since the Arkansas statute specifically allows the introduction of evidence to prove mitigating factors not specifically enumerated, Lockett is obviously not on point here.

It is highly significant that this Court's holdings and dicta with regard to mitigating circumstances uniformly refer to evidence relevant to the particular defendant and to the crime for which he is being tried. This Court has never held that a defendant is entitled to present evidence on any issue he chooses and call it evidence of a mitigating factor.

This Court began close scrutiny of state statutory provisions with regard to mitigating factors in 1976. In Woodson v. North Carolina, 428 U.S. 280, 304 (1976), (Stewart, Powell, Stevens, JJ., concurring), it was stated:

> [I]n capital cases the fundamental respect for humanity underlying the Eighth Amendment. . . requires consideration of the character and record of the

> individual offender and the ciroumstances of the particular offense as a constitutionally indispensable part of the process inflicting the penalty of death. (Citation omitted.)

In Proffitt v. Florida, 428 U.S. 242 (1976), the Court upheld the constitutionality of Florida's statute governing the consideration of mitigating circumstances. It also cited with apparent approval the Model Penal Code provision, 428 U.S. at 250 n. 5. It is interesting to note that the only subsection of that provision apparently not included in the Florida statute, subsection (c) regarding the consent of the victim, is also the only one not included in the Arkansas statute. Apparently the Florida statute did not have the language included in the Arkansas statute which permits consideration of other mitigating factors. In discussing the constitutional requirements for consideration of mitigating factors, the Court noted that a statute must cover factors "relevant to sentencing" and must include "matters relating to certain legislatively specified aggravating and mitigating circumstances." 428 U.S. at 248. It noted further that the Florida statute "focuses on the circumstances of each individual homicide and individual defendant in deciding whether the death penalty is to be imposed." 428 U.S. at 258.

The Court quoted Woodson and specifically enumerated circumstances which must be considered in Roberts v. Louisiana, 431 U.S. 633, 637 (1977) (per curiam):

> Circumstances such as the youth of the offender, the absence of any prior conviction, the influence of drugs, alcohol, or extreme emotional disturbance, and even the existence of circumstances which the offender reasonably believed provided a moral justification for his conduct are all examples of mitigating facts which might attend the killing of a peace officer and which are considered relevant in other jurisdictions.

Although the Court did not imply that this was an exhaustive list and respondent would not presume to infer that it is, the Court further clarified the constitutional requirements by holding that a state must allow "consideration of whatever mitigating circumstances may be relevant

to either the particular offender or the particular offense." 431 U.S. at 637 (emphasis added).

Similarly, the Court held in Gregg, 428 U.S. at 192, that sentencing problems can be alleviated if the jury "is given guidance regarding the factors about the crime and the defendant that the State, representing organized society, deems particularly relevant to the sentencing decision." (Emphasis added.) In upholding the Georgia statutory scheme, the Court referred with approval to a requirement that the jury "consider the circumstances of the crime and the criminal before it recommends sentence," focusing attention on the "characteristics of the person who committed the crime." 428 U.S. at 197. It also noted that procedures held unconstitutional in Furman v. Georgia, 408 U.S. 238 (1972), "were not directed to give attention to the nature or circumstances of the crime committed or to the character or records of the defendant." Gregg, 428 U.S. at 206.

In Lockett, the Court reiterated its holding in Woodson and noted that it was faced in Lockett with the specific question it had not answered in Woodson: "which facets of an offender or his offense it deemed 'relevant' in capital sentencing or what degree of consideration of 'relevant facets' it would require." It specifically held:

> [W]e conclude that the Eighth and Fourteenth Amendments require that the sentencer, in all but the rarest kind of capital case, not be precluded from considering as a mitigating factor, (emphasis in the original) any aspect of a defendant's character or record and any of the circumstances of the offense (emphasis added) that the defendant proffers as a basis for a sentence less than death.

Lockett, 438 U.S. at 604.

Several state supreme courts dealing with this issue have consistently held that evidence offered in mitigation must be relevant to the defendant himself or to the crime at issue. The two most nearly on point here are Franklin

v. State, 245 Ga. 141, 263 S.W.2d 666 (1980), and Irving v. State, 316 So.2d 1360 (Miss. 1978), cert. denied, 441 U.S. 913, (1979).

In Franklin, the defendant intended to offer as witnesses a reporter, a prison chaplain and a professor of religion who had testified without objection in Davis v. State, 241 Ga. 376, 387, 247 S.E.2d 45, 52 (1978). When the State objected at defendant's trial, the trial court held an in camera hearing to review the testimony and ruled it inadmissible because it related to the death penalty in general and not to the particular defendant. The Georgia Supreme Court upheld the trial court and held that "descriptions of executions and of life on death row, statistics relating to executions, and religious and philosophical approaches to the death penalty" are not relevant as mitigating evidence. Franklin, 263 S.W.2d at 672-73.

The defendant in Irving proferred the testimony of a preacher who apparently testified in camera "about his finding on various studies concerning the effect and imposition of the death penalty, and that even after Furman v. Georgia, 408 U.S. 238 (1972), the death penalty is still applied cruelly and arbitrarily." Irving, 361 So.2d at 1372. The Mississippi Supreme Court upheld the trial court's exclusion of the testimony, citing Jackson v. State, 337 So.2d 1242, 1254, (Miss. 1976), in which the court held:

> We now hold that at the sentencing hearing, the defendant may introduce competent evidence relevant to the determination of punishment, even though such evidence might not have been admissible on the question of his guilt. He may prove his lack of a prior criminal record and may introduce such other evidence of his character or the particular circumstances of his crime that would be relevant in deciding whether he should be sentenced to death or life imprisonment.

Similarly, in Bishop v. State, 95 Nev. 511, 516, 597 P.2d 273, 276 (1979), the Nevada Supreme Court stated in dictum that the defendant "must be given the opportunity

to present evidence of whatever mitigating circumstances may be relevant to either the particular offender or the particular offense before a death penalty can be imposed," citing Lockett, Roberts and Woodson.

In Coppola v. Commonwealth, 220 Va. _____, 257 S.E.2d 797 (1979), cert. denied, 444 U.S. 1103, (1980), the Virginia Supreme Court upheld the trial court's exclusion of two different categories of evidence offered in mitigation-- evidence of the effect of the defendant's arrest and prosecution on his children and evidence that a co-defendant or accomplice had been convicted of the same capital murder and sentenced to life imprisonment. Noting that a Virginia statute governing the admissibility of mitigating evidence vests discretion with the trial court, subject to the rules of evidence governing admissibility, the court held that the evidence with regard to the effect on the defendant's family is

> not analogous to any of the evidence specifically approved by the statute. The kind of evidence therein contemplated bears upon the record of the defendant and the atrociousness of his crime. Evidence of a previous good record, and extenuating circumstances tending to explain, but not excuse, his commission of the crime, is admissible mitigating evidence for the jury to consider in determining whether the defendant will probably be a continuing serious threat to society, or whether his conduct in committing the murder was outrageously or wantonly vile, horrible or inhuman. But the effect of his incarceration upon relatives is not a mitigating circumstance for the jury to consider.

Coppola, 257 S.W.2d at 804.

With regard to the evidence of the other defendant's conviction, the court held that the jury is required to consider

> evidence in mitigation of the offenses relevant to the defendant's past record and the nature of his conduct in committing the crime. Evidence as to the result of another defendant's trial for the same crime is irrelevant to the determination by the jury of the appropriate punishment for the defendant whose sentence is being weighed.

257 S.W.2d at 805.

The trial court's refusal to grant a continuance in this case is tantamount to the exclusion of the evidence proffered by petitioner in the form of a transcript of the witness' testimony in a prior proceeding in another state. This would only have been error if petitioner was constitutionally entitled to present such testimony at the sentencing hearing. It is clear from the cases cited above that the type of general evidence about electrocution as a means of inflicting capital punishment and about rehabilitation of murderers in general is not the type of evidence which a defendant is constitutionally entitled to present. There was no showing that the witness knew anything about the petitioner or about the nature of his crime. There was thus no error of constitutional magnitude.

The Court should deny the petition for writ of certiorari because it has consistently and repeatedly held, at least by implication, that a defendant in a capital case is only entitled to present evidence in mitigation which is relevant either to the defendant himself or to the crime at issue. It has also clearly held that electrocution as a means of inflicting capital punishment is constitutionally permissible and is a matter for legislative determination. The holding of the Arkansas Supreme Court that the trial court did not err in denying the continuance is thus in keeping with this Court's prior decisions, as petitioner was not denied his constitutional right to present relevant evidence of mitigating factors during the sentencing phase of his trial.

The Court should thus deny the petition for writ of certiorari because this Court has already decided the question presented, and both the trial court and the Arkansas Supreme Court ruled in accordance with this Court's prior decisions.

III. PETITIONER WAS TRIED BY A FAIR AND IMPARTIAL JURY BECAUSE THE THREE JURORS CHALLENGED HERE WERE QUALIFIED TO SERVE UNDER PRIOR DECISIONS OF THIS COURT.

Petitioner alleges in his third argument that he was denied a trial by a fair and impartial jury because pretrial publicity resulted in the formation of opinions as to his guilt by prospective jurors. He further alleges that three jurors who were seated were aware that petitioner had previously been convicted of the same crime and had information about his background, including allegations that he had committed other crimes.

Respondent will rely here on the fact that this issue was decided correctly by the Arkansas Supreme Court, which based its opinion primarily on this Court's holding in Murphy v. Florida, 421 U.S. 794 (1975). In fact, the Arkansas Court's review of this issue is presented both succinctly and comprehensively, both as to the facts of this case and the applicable law, and respondent will quote salient portions of that opinion as the most expedient method for disposing of petitioner's argument here.

> The United States and Arkansas constitutions entitle a defendant to a fair trial. If, because of pretrial publicity, an impartial jury cannot be seated to try a defendant, his right to a fair trial is violated. Irvin v. Dowd, 366 U.S. 717 (1961); Swindler v. State, supra; Ruiz & Van Denton v. State, 265 Ark. 875, 582 S.W.2d 341 (1979).
>
> Swindler's first argument is that, in Scott County, he could not be tried by an impartial jury.
>
> While Swindler's counsel moved six times for a mistrial or change of venue during the 5 days' voir dire examination, no evidence at all was offered of pretrial publicity. No affidavits or testimony, showing pretrial publicity or ill feelings in the community as a result of the killing, was offered, as they had been in Swindler v. State, supra or Ruiz & Van Denton v. State, supra.
>
> Our law provides affidavits or sworn testimony must be offered to support a motion for a change of venue. Ark. Stat. Ann. §43-1502.
>
> The only evidence we have of prejudicial pretrial publicity is the voir dire testimony of the prospective jurors as 120 jurors were examined. Swindler had not exhausted his peremptory challenges until after the 11th juror had been selected.

The trial court, no doubt mindful of our decision in the first Swindler case, was careful and took pains in selecting this jury.

The fact 120 were examined is not, standing alone, enough to conclude a fair and impartial panel could not be seated.

The judge excluded over 79 people for cause. The jurors seated, while in some instances acknowledging that they knew generally of the crime, Swindler, or the first trial, all said they could set aside what they had heard and try Swindler on the facts and according to the law.

The test of whether pretrial publicity has prejudiced a juror was set forth in Irvin v. Dowd, supra. It reads:

> It is not required that the jurors be totally ignorant of the facts involved. . . To hold that the mere existence of any preconceived notion as to the guilt or innocence of the accused, without more, is sufficient to rebut the presumption of a prospective juror's impartiality would be to establish an impossible standard. It is sufficient if the juror can lay aside his impression or opinion and render a verdict based on the evidence presented at court. 366 U.S. at 722-723.

Deciding to seat a juror challeged for bias is a discretionary matter with the trial judge. To reject a potential juror, the judge must be satisfied that the juror's state of mind is such that he cannot render an impartial judgment and that seating him will result in substantial prejudice to the rights of the defendant. Jones v. State, 264 Ark. 935, 576 S.W.2d 198 (1979).

Swindler's attorney did not move to strike 9 of the jurors selected. One was overseas at the time of the killing; another had read or heard nothing of the case, except from her husband; one knew nothing of the facts but only vaguely recalled "something" about it; another had read, some three weeks before this trial, the local paper in Scott County about the killing; one recalled some news account and probably decided Swindler was guilty because he had been found guilty before; one had seen a "little bit" on T.V. and read in the local paper that a Fort Smith policeman was shot. Another had heard nothing and knew nothing. All of these were selected with no objection. The last juror selected, who knew nothing, was selected after the defense had exercised all the peremptory challenges.

The three jurors selected, that the defense challenged for cause, were all selected when the defense had remaining a peremptory challenge. These three did admit to having more knowledge than the others.

Thurman Jones had read the Fort Smith newspapers and seen the "case on T.V." He also read that Swindler was accused of killing two others in South Carolina. He had assumed Swindler was guilty since he had been convicted. Jones was questioned extensively. He acknowledged he could set aside all his ideas and information and give Swindler a fair trial.

Milton Staggs had read and heard some about the case and had formed a "little bit" of an opinion. He said he would have no difficulty in setting aside any information or opinion he had formed.

Henry Sunderman had read and heard of the case. He declared he had no opinion about the case. Since a jury had convicted Swindler before, he had to conclude Swindler might well be guilty. But he said he could do his duty in this case and disregard any information he had about the case.

The judge, in his discretion, decided these jurors could serve. We cannot say the judge clearly abused his discretion in selecting these jurors.

There is no comparison at all between this case and the first Swindler case and the Ruiz & Van Denton case. The appellant cites as controlling the cases of Irvin v. Dowd, supra, and Sheppard v. Maxwell, 384 U.S. 333 (1966), the case involving Dr. Sam Sheppard. In both Irvin and Sheppard there was strong evidence of pretrial publicity that prevented the selection of a fair jury. As we indicated there was no such evidence offered in this case. The only real argument the appellant has is that over 80% of those questioned were excused for cause.

We have independently examined the voir dire, as we are required to do in such cases. We find that the facts in Swindler's second trial regarding the composition of the jury are not unlike those that were found to exist in the case of Murphy v. Florida, 421 U.S. 794 (1975). In the Murphy case the Court also found that a considerable number of jurors knew of Murphy's crimes and his past crimes. However, the Court did not find that such information alone required a reversal of Murphy's conviction. The Court compared the difference between Murphy's case and that of Irvin v. Dowd, supra. The Court stated:

> The voir dire in this case [Murphy's] indicates no such hostility to petitioner by the jurors who served in his trial as to suggest a partiality that could not be laid aside. ...

Applying the tests we have recited, we must conclude that the appellant has not demonstrated such prejudice in the community nor bias on the part of the juror that would require a new trial.

* * *

The third argument has no merit. The single fact that over 80% of the jurors questioned were excused for cause is not sufficient to find that a mistrial should have been granted or change of venue ordered. That is only one consideration. The judge and lawyers spent 5 days selecting a jury. Except for the three jurors objected to, it can hardly be argued the jury was unacceptable. The fact the defense had to use its preemptory challenges (as did the State) is no reason to find a jury could not be seated.

Swindler, 267 Ark. Adv. Sh. at 424-28. (The slip opinion in found in petitioner's appendix at A-1.)

Again, as in his Point I, petitioner has indulged in emphasizing the statements made by prospective jurors which are favorable to his position and had omitted or only casually mentioned the more definite statements which rendered them qualified to serve. For this reason, respondent feels compelled to summarize more fully the voir dire examination of the three jurors.

The second juror seated was Henry Sunderman. On direct examination he stated that he knew a little bit about the facts of the case (T. 971) but that he did not have an opinion about it (T. 972). He stated that he would make his decision based on the facts, that he would not require petitioner to put on any evidence to prove his innocence and that he would "leave the entire burden with the State." (T. 973)

On cross-examination Mr. Sunderman remembered that an altercation took place at a service station and remembered the names of the victim and petitioner from television news accounts (T. 975). He remembered that petitioner was from North or South Carolina and that there were some sort of assault charges brought against him in that state. He didn't remember anything other than that. He stated that people had been convinced (of petitioner's guilt) after the first trial (T. 977) and that the majority had felt he was guilty. At that time he was of the opinion that petitioner was guilty but that was not his opinion at trial (T. 978). At trial he would base his opinion on the evidence that was presented. He felt that the first jury had made its decision on the facts that were presented to them (T. 979). He felt that if he sat on the jury it would be his duty to make his decision based on the facts presented to him, not on what had been presented somewhere else and stated that he would not consider what another jury had considered nor what their verdict was. (T. 980) He said he could listen to the evidence presented in court

and not consider the other evidence because he didn't remember what the evidence had been (T. 981). He said he could find for the petitioner if the State had not proved to him beyond the "shadow of a doubt" that petitioner was guilty (T. 982). He said he would consider in his deliberations all the possibilities of lesser included offenses, (T. 983) and he would weigh equally both the death penalty and life without parole if petitioner were found guilty of capital murder. He would not give more credence to a policeman's testimony than to that of an ordinary citizen (T. 984).

Petitioner objected to the court's seating Mr. Sunderman and moved that he be excused for cause because he had background information about petitioner. The Court overruled the objection, and Mr. Sunderman was seated after petitioner said, "Your Honor, he is a good juror." (T. 985) (The voir dire of Mr. Sunderman appears in the petitioner's appendix at A-22 - A-36.)

The second juror challenged here was the fourth juror seated, Thurman Jones. On direct examination by the State, Mr. Jones stated that the only thing he knew about the case he found in the newspaper and on television (T. 1146). Based on what he had heard or read he had not formed an opinion as to how the case should be decided. The only opinion he could form was that petitioner was guilty because the first jury had found him guilty. He stated that he didn't hear the evidence before so he didn't know what that jury had based its decision on. He said he could base his decision just on what happened at the second trial (T.1147). He said he was not "too hep" on the death penalty, but in certain cases he "would believe in it," although it would have to be an extreme case before he would "go for" the death penalty (T. 1148). He stated that he could follow Arkansas law and could impose the death penalty if it were called for. He did

state that since petitioner had had a trial and he knew about it, he wondered if petitioner was not going to have to prove to him his innocence (T. 1149). Later on he stated that he would hold the State to its burden and not require petitioner to present any evidence that he was not guilty (T. 1150).

On cross-examination, Mr. Jones stated that he had not read completely an account of petitioner's crime until the day before the voir dire occurred. He recalled that a police officer was shot in Fort Smith; that the suspect "took off" and was caught him in the "bottoms"; that they arrested the man, put him in jail and sent him to Little Rock for sanity tests (T. 1153). He also read that petitioner was accused of killing two teenagers in South Carolina. He said that he didn't remember discussing the case with anyone, and, if they had stated their opinion to him, it wouldn't have made any difference. In fact, he never heard anyone express the opinion that petitioner was guilty or not (T. 1154). He stated that he had formed the opinion that petitioner was guilty when he was previously convicted. Since he didn't hear any part of the testimony he couldn't say whether petitioner had received a fair trial. Regarding the presumption of innocence, Mr. Jones stated that he would base his decision on what he heard in the courtroom (T. 1155). He stated that he couldn't give petitioner the same presumption of innocence as if he hadn't already been convicted. The only thing he could assume from the conviction was that petitioner was guilty (T. 1156). He emphatically stated that he would listen to the evidence, would take what happened in the courtroom, and would follow the judge's instructions and the law without remembering all he had heard (T. 1157). He again stated that if he were on the jury he would listen to what was said and base his opinion on that, "period." He denied any knowledge of the evidence in the case (T. 1158)

and stated that if he were deliberating on the jury and could not rid his mind of something he had heard outside the courtroom, he would report it to the judge (T. 1160). He stated that he would not give police officers' testimony any more credence than an ordinary citizen's, and he would consider the lesser included offenses (T. 1161). He said he would consider both penalties and give them both equal weight. He also believed one could assert the defense of self-defense against a policeman (T. 1162). He said he could just consider the evidence and not consider anything about petitioner's background because it was just hearsay and had not been proved (T. 1163).

Petitioner objected to seating Mr. Jones because his answers were contradictory and because he had too much information about appellant's background (T. 1164). When the court overruled him, he stated, "He is good, Your Honor." (T. 1164) (The voir dire of Mr. Jones is found in petitioner's appendix at A-37 - A-55).

Milton Staggs is the third juror challenged here and was the seventh seated at trial. Mr. Staggs stated on direct examination that he had heard "a little bit" about the case from the media (T. 1222). He said he had an opinion based on what he had heard, but that it was not so fixed in his mind that he could not set it aside and base his decision on what he heard in the courtroom (T. 1223). He understood that petitioner was presumed to be innocent until he was proven guilty (T. 1226). He also said he would hold the State to its burden of proving guilt beyond a reasonable doubt and that his decision would be based on the facts either way (T. 1227). The trial court participated in the voir dire to clarify Mr. Staggs' position on these issues. (T. 1228-1230)

On cross-examination Mr. Staggs stated that he could not recall any specifics about the case, although he could remember seeing something in the media (T. 1231). After

more pointed questioning he did recall that a policeman was shot and that a suspect (petitioner) was apprehended. He continued that no one had expressed an opinion to him about how the case should be decided (T. 1232). Based on all he had heard, he said he had not formed an opinion because one could not really say something happened just because one saw it on the news (T. 1234). Based on what he had heard, he had "a little bit of an opinion" that it would have to be "like it came out." He stated it was not a fixed opinion, that he could set it aside and accept facts (T. 1235). He said he would not require any evidence from petitioner. He would listen to the evidence and not consider anything else he might have heard. He would only want to hear "what went on at the present" - he would not compare the State's evidence with what had been reported (T. 1236). He stated that he wouldn't serve on the jury if he couldn't drop his opinion (T. 1237). After questioning about lesser included offenses, police testimony and the two possible penalties, Mr. Staggs again stated that he could set aside anything he might have heard and consider only what was presented in court (T. 1239).

Defense counsel submitted Staggs for cause because he had an opinion (T. 1240). When he was overruled he stated, "Your Honor, this juror is good." (The voir dire of Mr. Staggs appears in petitioner's appendix at A-59 - A-78.)

Each of the challenged jurors testified that he would listen to the evidence and make his decision based on what he saw and heard in the courtroom. Each also stated that he could set aside any opinion he might have formed after hearing media reports about petitioner and the crime. This Court's holding in Murphy makes it clear that prospective jurors in State court trials who have learned

from news sources of the defendant's background or prior crimes are not presumed to be prejudiced. It distinguished cases such as Irvin v. Dowd, 366 U.S. 717 (1961), and Sheppard v. Maxwell, 384 U.S. 333 (1966), in which the atmosphere at trial "had been utterly corrupted by press coverage," resulting in an atmosphere likened to a circus or a carnival. Cases in which there is extremely inflammatory publicity

> cannot be made to stand for the proposition that juror exposure to information about a state defendant's prior convictions or to news accounts of the crime with which he is charged alone presumptively deprives the defendant of due process.

Murphy, 421 U.S. at 798-99.

The test, according to this Court, is whether the totality of the circumstances indicates that petitioner's trial was not fundamentally fair. While the defendant is to be given the opportunity to demonstrate "the actual existence of such an opinion in the mind of the juror as will raise the presumption of partiality," that burden remains on the defendant. Murphy, 421 U.S. 799-800. The Court also made it clear that it will distinguish "mere familiarity with petitioner or his past and an actual predisposition against him" and will also distinguish "factual publicity from that which is invidious or inflammatory." 421 U.S. at 800 n. 4.

This Court has held that a defendant is required to produce specific examples of the allegedly prejudicial publicity to show ill feelings in the community. Dobbert v. Florida, 432 U.S. 282 (1977). In order for a reviewing court to examine a charge of pretrial publicity leading to jury bias, both the nature and extent of the publicity must be in the record. See Irvin, 366 U.S. at 724-28; United States ex rel. Bloeth v. Denno, 313 F.2d 364 (2d Cir. 1962), cert. denied, 372 U.S. 978 (1963). As noted by the Arkansas Supreme Court, petitioner never proffered any evidence of the specific types of publicity to which

the jurors were exposed. There is therefore nothing in the record to support petitioner's bare allegations of prejudicial publicity. There is also nothing in the voir dire of the three challenged jurors to indicate that related media coverage was anything other than factual, nor is there any reflection of hostility or animosity toward petitioner.

Petitioner also failed to elicit from the challenged jurors that any of them had a fixed opinion that he was guilty. On the contrary, each testified that he could set aside his impression or opinion and render a verdict based on the evidence presented in court. That is all that this Court requires under Murphy and Irvin.

Petitioner apparently advances the discounted theory that jurors should be totally ignorant of the facts and issues involved in his trial. That was declared to be an "impossible standard" by this Court in Irvin, 366 U.S. at 722.

The jurors who expressed any opinion with regard to the guilt of petitioner based those opinions on a previous finding by another jury that the petitioner was, in fact, guilty. That conclusion is the logical one to be drawn by anyone who believes in the American criminal justice system. Those who commented on it noted, however, that they were not familiar with the evidence presented to the other jury and would refrain from making any judgment until they heard the evidence presented in the instant trial. The trial court was able to judge the sincerity of the jurors' assurances. He did not abuse his discretion in refusing to excuse them for cause.

The petition for writ of certiorari should be denied because petitioner has failed to show that the selection process for his jury was tainted by prejudicial pretrial publicity. He has also failed to show that any juror seated held a fixed opinion of his guilt or was unwilling

or unable to set aside any prior impressions. Both the holding and reasoning of the Arkansas Supreme Court comport with prior decisions of this Court. There is thus no reason to grant certiorari.

CONCLUSION

Rule 17.1 of the Rules of the Supreme Court states that review on writ of certiorari will only be granted when there are special and important reasons therefor. Subsection (c) provides that such writs will be granted when a state court has decided a federal question in a way in conflict with applicable decisions of this Court or if it has decided an important federal question of federal law which has not been, but should be, settled by this Court.

Although respondent acknowledges that review on writ of certiorari is discretionary, and that the Court is not bound by the guidelines of Rule 17.1(c), it submits that the questions presented here were properly decided by the Arkansas Supreme Court. The Arkansas Court followed the decisions of this Court, and no important undecided questions of federal law are presented.

For these reasons and for the reasons and authorities cited in respondent's brief in opposition to the petition for writ of certiorari, respondent respectfully prays that this Court deny review on writ of certiorari.

Respectfully submitted,

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